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Stephen Tierney: After the referendum – the Scottish Government’s proposal for a written Constitution



The debate over Scottish independence has turned recently to discussion of the post-referendum landscape. On 5 February the Scottish Government published [*Scotland's Future: from the Referendum to Independence and a Written Constitution*](#) which suggests that a two stage process would follow upon a majority Yes vote. From the date of the referendum until March 2016 a period of constitutional negotiations with the UK Government is proposed, culminating in the formal grant of independence by Westminster. Following the Scottish

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parliamentary elections in May 2016 a constitution-framing process, internal to Scotland only, would then take place. Although the prospect of a Yes vote is, to say the least, far from certain with [support failing to rise above 35% in most polls](#), each of these proposed stages is interesting, not least for the questions left unanswered in the *Scotland’s Future* paper.

The first issue is timing. *Scotland’s Future* (1.6) states: ‘The right time for a written constitution to be drafted is... after independence, not before. At that point the people of Scotland, whatever their views in the referendum, will be able to engage fully in the process of planning for our country’s future.’ It is, therefore, not the intention of the Scottish Government to engage in setting out a draft constitution in advance of the referendum. But it still seems inevitable that speculation about the content of a future constitution of an independent Scotland will inevitably be a focal-point, albeit possibly not a major one, of the referendum campaign, particularly after the Scottish Government publishes its promised White Paper towards the end of this year on the content of independence which will inevitably contain commitments which would in due course require constitutional protection.

Not surprisingly, therefore, *Scotland’s Future* is somewhat light on the possible content of a new constitution, but there are some hints about the Government’s preferences. It is notable in itself that the Government proposes a written constitution (*Scotland’s Future* 1.5). It also suggests that the Sovereign will continue as head of state (2.14); that there will be a Supreme Court of Scotland, and that this court will have the power to strike down unconstitutional legislation (the constitution will contain ‘citizens rights that cannot be taken away by a decision of Parliament’ – 1.5). This raises a number of questions about court structure under the new regime. How would a new Supreme Court be established and how would it be populated? Would it be a free-standing court with personnel separate from the existing superior courts in Scotland, and if so could this be justified given the limited number of constitutional issues that come from Scotland to the UK Supreme Court at the moment? Or would judges from the Court of Session [sit on this on an *ad hoc* basis?](#)

There is also a reference to Scotland’s membership of the European Union (and of course there is a separate debate about how that membership will be secured) being subject to constitutional provision (2.3). Little is said about institutional arrangements. One question that will inevitably arise in the referendum campaign is whether there would be any proposals to make the Scottish Parliament bicameral or at least to institute some model of review body to assess and scrutinise draft legislation.

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Scotland's Future spends longer setting out a commitment to collectivist values in the form of social rights which it suggests will also enjoy constitutional protection. There is a proposal to enshrine within the constitution an entitlement to public services and ‘to a standard of living that, as a minimum, secures dignity and self-respect’ (1.10) and possibly also ‘constitutional rights in relation to issues such as welfare, pensions, health care and education’ (1.10). There is also a radical suggestion that principles on climate change, the environment and the sustainable use of Scotland’s natural resources should be constitutionally protected and that there might be a constitutional ban on nuclear weapons being based in Scotland. Each of these proposals of course raises questions about what type of enforcement would accompany such provisions; in particular would the courts be vested with the duty to enforce social and environmental rights etc., the constitutional appropriateness of such a duty the competence of judges to execute it. The final substantive proposal in *Scotland's Future* is for an examination of the war power and a constitutional guarantee that this power would be shared by the Scottish Government and the Scottish Parliament. Separately, the Government has also suggested [constitutional provisions on Scotland's system of local government](#).

The paper also turns to process and it is here that the two stage approach emerges. The first stage after the referendum would be the interim period within which Scotland would become independent. The intention is that during this period of some 15-16 months up to March 2016, agreements will be reached between the Scottish and UK Governments on this transition, establishing the timetable towards ‘independence day’ in March 2016. All of this would pave the way for the scheduled elections to the Scottish Parliament in May that year, which would on this proposal become elections to the Parliament of an independent country.

Scotland's Future acknowledges that the following issues would need to be the subject of negotiation and agreement: ‘the division of financial and other assets and liabilities (including oil revenues and assignation of other tax revenues, military bases and overseas assets), the transfer to the Scottish Parliament and Government of political authority over institutions previously controlled at Westminster... and the timetable for the speediest safe removal of weapons of mass destruction from Scotland.’ Interestingly, there is also reference to the ‘on-going co-operative arrangements that the peoples of Scotland, England, Wales and Northern Ireland would share’. It is not clear what is meant by this, although notably the Scottish Government during its period in office between 2007 and 2011 produced a White Paper [‘Scotland's Future: Draft Referendum \(Scotland\) Bill Consultation Paper’](#) which famously stated that under independence ‘the social union with the

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remainder of the UK would be maintained, with the nations continuing to co-operate on a range of matters’. It is not clear if this is what is meant by ‘on-going co-operative arrangements’ in *Scotland’s Future*. It is also acknowledged in *Scotland’s Future* that some matters will remain unresolved until after independence as happened in the split between the Czech Republic and Slovakia; in other words even after 2016 there would still be an on-going period of gradual separation.

Turning to process, it is also suggested that the Scottish Government will seek to make the post-referendum negotiations inclusive (2.7) by inviting ‘representatives from the other parties in the Scottish Parliament, together with representatives of Scottish civic society’ to join in these negotiations and in helping to ensure ‘the continuity of those public services which are in reserved areas.’ The basis for the interim arrangements would be a ‘constitutional platform’ to facilitate the new Parliament and Government elected in 2016. There would potentially be something of a constitutional vacuum after ‘independence day’ when the writ of the Scotland Act would no longer run but in which no new constitution would have yet been promulgated. And so (2.10) ‘until that constitution is drafted and comes into force, arrangements will be in place from independence day to consolidate the existing rights of citizens and give the Scottish Parliament and Government the legal, financial and other powers necessary to govern Scotland effectively across the full range of national issues. These arrangements will form Scotland’s constitutional platform.’ A number of questions arise: where would sovereignty rest in this period – would the Scottish Parliament take on a new sovereign power through the constitutional platform, or would there be some notional reversion to the sovereignty of the pre-1707 Scottish Parliament? And what of the Crown, the Privy Council etc.? Finally, *Scotland’s Future* proposes a constitutional path to terminate Westminster’s authority. The UK Parliament would legislate ‘to acknowledge the end of its power to legislate for Scotland’ (2.13) in a way similar to the Malta Independence Act 1964 and the 1931 Statute of Westminster.

There is also some discussion of the process towards a written constitution. *Scotland’s Future* suggests the possibility of a constitutional convention to be convened by the newly elected independent Scottish Parliament to draft this (1.7). It is not clear what shape this would take but it ‘should engage all the people of Scotland in the process of nation-building and allow them a say in defining how our country will work. (1.6)’ Reference is made to the citizen-led assemblies and constitutional conventions convened in British Columbia (2004), the Netherlands (2006), Ontario (2007) and Iceland

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(2010) as well as the citizen-led constitutional convention convened in Ireland in 2012. Given that such an open process is proposed we must assume that the substantive proposals for the written constitution set out in *Scotland’s Future* would themselves be open to revision. For example, such a constitutional convention may well decide not to include social rights and could also opt for a republican rather than monarchical system of government etc. Finally, another question is, would there be referendum to ratify this constitution and would the referendum find its way into the constitution as a standard mechanism of constitutional amendment? What we know of referendum use is that it tends to be contagious; once used to change a system of government it often finds its way into a new constitution as part of the process of future change.

It is likely that these issues will be discussed in detail over the next 18 months. Regardless of the outcome of the referendum they may well also prompt wider UK debates about constitutional change and could also help frame the landscape for further constitutional re-thinking in Scotland, even in the event of a majority No vote.

Stephen Tierney is Director, Edinburgh Centre for Constitutional Law. This blog is based upon a paper given to the Law Society of Scotland on 7 March 2013. I am grateful to those present for a most fruitful discussion of the paper.

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